Against the Grain

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# Legally Speaking — ResearchGate Challenges Academic Copyright

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# LEGAL ISSUES

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## Legally Speaking — ResearchGate Challenges Academic Copyright

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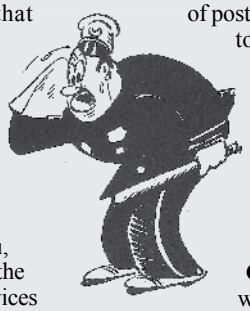
Scholarly communication has become a significant topic in the publishing industry and the academic field recently, as organizations and universities are seeking ways to provide and obtain open access to academic publications that often infringes on copyrights that have been secured from the academic authors through contract agreements with publishers. Most notable is the recent issue with the professional network for academics and scientists called **ResearchGate** and the academic publisher **Elsevier**, as well as others interested publishing organizations, such as the **American Chemical Society**. The legal issues have gained international attention to the process and intentions of scholarly communication that has been a significant aspect in the spread of knowledge for centuries.

Scholarly communication has been a source for intellectual and scientific growth for a long time, especially during the 1960s and the 1970s as universities began to expand, however the scholarly communication remained stagnant from the 1970s to the 1990s. According to **Jack Meadows**, "Communication lies at the heart of research. It is vital for research as the actual investigation itself, for research cannot properly claim that name until it has been scrutinized and accepted by colleagues. This necessarily requires that it be communicated." The statement is significant in understanding how information helps in the growth of science and the humanities, yet copyright laws, publishers, and technology has complicated the availability of academic information for further research. Scholarly communication is a system that utilizes research universities, libraries, and publishers.

While scholarly communication was stagnant for nearly 20 years, the technology of the 1990s provided the spark to rejuvenate the interest in scholarly communication. Of course, the technology was also the outlet for publishers to capitalize on opportunities to expand publishing for academic authors. Also, the technology allowed new academic journals to evolve and provide more opportunities for academic authors. Furthermore, the technology has created the standard of accessing information at any time from just about anywhere.

**Christine Borgman** noted that through this technology, researchers "can exchange data and ideas with colleagues around the globe, and can do so quickly and conveniently…Yet essential elements such as the scholarly journal article are remarkably stable and print publication continues unabated, despite the proliferation of digital media. Thus, it is essential to consider relationships among technology, behavior, institutions, economics and policy exploring digital libraries and scholarly communication."



Therefore, the legal issues that technology has implemented intentionally and unintentionally is the ability to easily share copyrighted information amongst academic and public persons of interest. This is evident in the recent academic professional network organizations, such as **ResearchGate** and **Academia.edu**, which "have progressively become the most popular social networking services developed specifically to support academic and research practices."

Academic libraries and academic authors are intertwined with the publishers and the professional networking organizations by providing scholarly information within the fields of study. Typically, publishers do not pay authors for their work, nor do they provide funding into the research community. Libraries purchase the scholarly information from the publishers in order to provide that information to researchers, academic authors, and patrons. However, due to the increases in subscription prices and new academic journals entering the market, the newly found interest in scholarly communication has raised the issue of copyright ownership for academic authors.

However, the battle of ownership is between the publishers and the academic professional network organizations. In 2017, several publishers organized the **Coalition for Responsible Sharing** as they confronted the academic networking site **ResearchGate**. The coalition, which consisted of **Elsevier**, the **American Chemical Society**, **Brill**, **Wiley**, and **Wolters Kluwer** insisted that **ResearchGate** remove copyrighted material from their website. On October 5, 2017, the chairman for the coalition and senior vice president of the **American Chemical Society**, **James Milne** stated that the coalition had to take legal action against **ResearchGate**, because of the millions of notices that would have to be sent to academic authors to remove their content from the website. A lawsuit had already been filed in a regional court in Germany against **ResearchGate**, which is the location of **ResearchGate**.

The lawsuit in Germany, according to **Dalmeet Singh Chawla**, stated that the publishers wanted "clarity and judgement" on the process of posting copyrighted materials. Similar to the coalition's request to take down the copyrighted materials, **Elsevier** had requested **Academedia.edu** to send 2,800 take down notices of copyrighted materials on their site in 2013. In this instance, **Elsevier** did not pursue any legal recourse. However, **Elsevier** and the **American Chemical Society** sued **Sci-Hub**, which **Elsevier** was awarded $15 million; whereas the **American Chemical Society** is seeking $4.8 million.

On October 2, 2018, **Elsevier** and the **American Chemical Society** filed a lawsuit against **ResearchGate** in the U.S. District Court, District of Maryland, which stated, "This lawsuit focuses on **ResearchGate's** intentional misconduct vis-à-vis its online file-sharing/download service, where the dissemination of unauthorized copies of PJAs (published journal articles) constitutes an enormous infringement of the copyrights owned by **ACS (American Chemical Society)**, **Elsevier** and other journal publishers."

**ResearchGate** responded to the lawsuit on February 13, 2019, which they denied the allegations of copyright infringement and for declaratory relief and damages. In the document, **ResearchGate** admitted to the following: "it accesses and makes publicly available copies of some publications where the publication is subject to a **Creative Commons** license; it stores copies of certain content obtained from publicly available websites on its servers at the direction of a user when the content's author chooses to make the content publicly available on **ResearchGate**; and that authors who choose to make the full text of their work available can choose to share their work privately or publicly."

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The **ResearchGate** organization does recognize that it relies on authors to increase the traffic to the website that receives revenues and investments from venture capital. The organization knows that uploading and downloading published journal articles are illegal and the organization encouraged interested persons in the academic community to upload their work and join the networking site.

The organization understands that providing a platform for academic authors to submit their works can have copyright infringement issues. Yet, authors do submit their works, despite knowing that they may have given the rights to the works to a publisher. However, this is not always the case, as co-authors may have submitted the work without the other author's knowledge. A reason authors submit their works to the networking site is to provide their works to as many people as possible. Plus, some authors may have to meet tenure requirements, which would be beneficial if the authors that could provide statistical information on the citation of the work through **ResearchGate**.

Despite being the creators of the work, authors are not included in any of the lawsuits involving copyright infringement. **David Hansen, J.D.**, an Associate Librarian for Research, Collections and Scholarly Communication at **Duke University** has discussed the lack of recognition of academic authors during the legal battles between the scholarly publishers and the professional networking organizations. In his blog, "Giving the Authors a Voice in Litigation? An ACS v. ResearchGate Update" on February 14, 2019, **Hansen** noted that through numerous copyright lawsuits between publishers and other large organizations that the courts proceed "without much input at all from the actual authors of the works that form the basis of those lawsuits."

Interestingly, the organizations are having legal battles of copyrights that involve millions of dollars, while the authors that have created work, mostly likely for little or no income, have no say in the lawsuits nor is there any financial reward should either party of the lawsuit win a settlement. Possibly, the outcome of these lawsuits will eventually take in consideration of the author's work and their desire to provide relevant information and research to the masses, such as the concept of scholarly communication that open access to information can be vital in science, the humanities, and for society.

The lawsuits are providing awareness of the issues that have arisen in part to the new technology, the influx of new journals, and the networking sites, as well as the authors in context to copyright. Other countries, such as China, Africa, and India, are also working toward better ways of providing open access to scholarly works, which could be significant in advocating for authors and supporters of scholarly communication. In addition, the lawsuits could also be an opportunity for academic authors to negotiate and create new policies for how academic works are published and provided to the public. Libraries also have the opportunity to provide a voice in how they can acquire academic works and provide the works for their patrons.

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# Cases of Note — Disparaging Trademarks Are Free Speech

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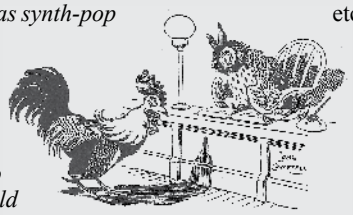
***MATAL, INTERIM DIR. U.S. PATENT AND TRADEMARK OFFICE V. TAM***. 137 S.Ct. 1744 (2017).

"Chinatown Dance Rock" band "The Slants" applied for federal trademark protection for their name. All were Asian-Americans from Portland. They claimed to feel the derogatory term could be "reclaimed" and drained of its denigrating force.

*And they must have gotten that language from a college professor. Or perhaps it's learned in grade school in Portlandia.*

*At any rate, they have a niche popularity with the subculture of Otaku, which is Japanese for "geek" or "nerd" and particularly refers to manga obsessives.*

*Their music is described as synth-pop similar to "Chvrches" and "I Am X." Their influences are '80s bands like "Duran Duran," "Depeche Mode," and "The Cure."*



*The term "slant" refers to the epicanthic fold or skin fold of the upper eyelid, common but not universal among Asians. And was once a common slur.*

*And our gang of rockers has albums named "The Yellow Album" and "Slanted Eyes, Slanted Hearts."*

The Patent and Trademark Office (PTO) denied the application based on 15 U.S.C. §1052(a). It prohibits trademarks that may "disparage … or bring … into contempt or disrepute" any "persons, living or dead."

*Well, that's pretty obviously a loser if you want to stop reading right here. Can I have Little Bighorn Beer with George Custer on it stuck full of arrows?*

Trademark protection is designed for distinctive marks — words, names, symbols etc. — that distinguish one artisan's goods from another's. ***Wal-Mart Stores, Inc. v. Samara Brothers, Inc.***, 529 U.S. 205, 212 (2000). This helps consumers find desired products without confusion and protects the vendor's good will. ***Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.***, 469 U.S. 189, 198 (1985).

Trademark protection is ancient in origin and came here with the Common Law. For most of the 19th century, it was the province of the states. See ***Two Pesos, Inc. v. Taco Cabana, Inc.***, 505 U.S. 763, 780-782 (1992).

Congress decided to wade in in 1870, and the ***Lanham Act of 1946*** provided for federal registration. ***Lanham*** bars marks that are "merely descriptive or deceptively misdescriptive" of goods. §1052(e)(1).

More to the point, it has a "disparagement clause" that bars marks "which may disparage … persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt or disrepute." §1052(a). The PTO asks whether the mark may be disparaging to a substantial composite — though not necessarily a majority — of the referenced group.

*Who dreamed that up? Think 1946. The year before saw the birth of the United Nations, a dream of world government since* ***Woodrow***

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